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8
9 **IN THE SUPERIOR COURT FOR THE**
10 **COUNTY OF SANTA CLARA**

11 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

12 Plaintiff,

13 v.

14 CITY OF SAN JOSE AND BOARD OF
ADMINISTRATORS FOR POLICE AND
15 FIRE DEPARTMENT RETIREMENT PLAN
OF CITY OF SAN JOSE,

16 Defendants.

Case No.

**DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

Date: June 6, 2012
Time: 8:15 am

Trial Date: None Set

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19 **I. INTRODUCTION**

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21 San Jose voters voted *yesterday* to pass Measure B to reform the City's pension and
22 retirement benefits system. Under the state Elections Code, the Measure cannot become effective
23 for approximately a month and a half. Because the Measure requires implementing ordinances
24 and administrative actions, it will take even longer before the Measure's provisions take effect.
25 And because some of the Measure is simply a codification in the Charter of existing Municipal
26 Code provisions and MOA agreements, those provisions will not change *anything* for employees
27 or retirees.
28

1 Yet the day after the election, the San Jose Police Officers Association (“SFPOA”) has
2 rushed into court *ex parte*, seeking a temporary restraining order because the impairment of its
3 members’ rights “cannot be fully undone once made effective.” To the contrary, there is no basis
4 to grant a TRO, nor should the Court set an accelerated briefing schedule for this matter.

5 There is no risk of irreparable harm. The Measure is not legally certified, the City will
6 take months to implement it, and some provisions simply codify what already exists. Moreover,
7 even if an employee were to be adversely affected, the only possible harm is monetary in nature,
8 which is not irreparable harm.

9 Neither is there any basis for an expedited briefing schedule. As the SFPOA well knows,
10 in placing Measure B on the ballot, the City committed itself in advance to an orderly method for
11 judicial review of the Measure. To that end, the City has filed an action for declaratory relief in
12 the United States District Court with the goal of obtaining a judicial ruling on the legality of
13 Measure B before implementation of provisions that would be of economic consequence to
14 employees. The City intends to make a motion in this Court to stay this action while the federal
15 action is pending. The federal action is a more efficient means of verifying the legality of
16 Measure B because it addresses most provisions of Measure B, seeks an adjudication under both
17 federal *and* state law, and includes as defendants more interested parties. The SFPOA, in bringing
18 this action, is engaged in piecemeal litigation that will be inefficient and costly and result in a
19 multitude of actions. This Court should – at a minimum – hear the City’s motion to stay this
20 action before scheduling the preliminary injunction hearing.

21 Not only can the SJPOA *not* demonstrate irreparable harm, it cannot show a probability of
22 success on the merits of its claims that Measure B violates its vested rights. The City’s Charter
23 expressly reserves the right of the voters to modify retirement and other benefits. The City’s
24 Municipal Code and agreements with its Unions demonstrate that that the City has never created
25 vested rights in the retirement benefits identified by the SJPOA in this action.

II. BACKGROUND

A. Background to Measure B.

The City of San Jose ("the City") is committed to providing services that are essential to the quality of life and well-being of San Jose residents, including police protection; fire protection; street maintenance; libraries; and community centers ("Essential City Services").

The City's ability to provide Essential City Services has been and continues to be threatened by dramatic budget cuts caused in large part by the climbing and unsustainable cost of employee benefit programs, exacerbated by the economic crisis. For example, in the last few years, City payments for employee retirement costs have dramatically increased, from \$107 million in 2009-10, to \$245 million in 2011-12, and are projected to be \$319 million in 2014-15 – approximately 24% of the City's General Fund. In March 2012, Moody's downgraded San Jose's general obligation and lease revenue bonds, in part because of San Jose's "[i]ncreasing retirement cost burden."

In this context, the City Council voted to place Measure B on the ballot for the June 5, 2012 election. Measure B is intended to adjust post-employment benefits in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for the City's workers. Without the reasonable cost containment provided in Measure B, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at risk.

The City Council reasonably and responsibly anticipated this legal dispute at the time it voted to place Measure B on the ballot, and thus incorporated a grace period into the measure with respect to the increased employee contributions – the component of the Measure with the most direct economic impact on employees. The grace period delays implementation of increased pension contributions (which are an important component of the cost containment / sustainability features in Measure B) until June 23, 2013. This grace period is intended to permit adjudication of the legality of this component of Measure B before it impacts City employees. Moreover, to implement Measure B in its entirety, the City must develop administrative procedures and draft

1 implementing ordinances for submission to the City Council..

2 **B. Summary of Measure B.**

3 Measure B contains the following provisions, among others:

4 **1. Employee Contribution Rates. (Section 1506-A)**

5 Beginning June 23, 2013, the Act requires that the compensation of current employees be
6 adjusted to defray the unfunded liabilities in their pension plans. The Act requires employees to
7 make additional contributions to the retirement system in increments of 4% of pensionable pay per
8 year up to a maximum of 16% of pensionable pay per year, but no more than 50% of the costs per
9 year to amortize any pension plan unfunded liabilities.

10 **2. VEP (Section 1507-A).**

11 Under the Act, as an alternative to having their pay adjusted, employees may voluntarily
12 opt into a "Voluntary Election Program." In exchange for no reduction in pay, the VEP provides a
13 different pension plan. Implementation of the VEP is contingent upon IRS approval. Unless and
14 until the VEP is implemented, employees are subject to the pay adjustment in Section 1506-A.

15 **3. Disability Retirements (Section 1509-A).**

16 Under the Act, to receive a disability retirement, City employees "must be incapable of
17 engaging in any gainful employment for the City, but not yet eligible to retire." City employees
18 are considered "disabled" if they "cannot do the work they did before" and "cannot perform any
19 other jobs described in the City's classification plan" or in the case of safety employees, "cannot
20 perform any other jobs described in the City's classification plan in the employee's department."
21 Determinations of disability will be made by an independent panel of medical experts appointed
22 by the City Council, with a right to appeal to an administrative law judge

23 **4. Emergency Measures to Contain Cost of Living Adjustments (Section 1510-**
24 **A).**

25 Under the Act, if the City Council "adopts a resolution declaring a fiscal and service level
26 emergency, with a finding that it is necessary to suspend increases in cost of living payments to
27 retirees," the City may temporarily suspend cost of living adjustments in whole or part for up to
28 five years.

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2 **5. Supplemental Payments to Retirees (Section 15611-A).**

3 The Act discontinues the Supplemental Retiree Benefit Reserve and returns its assets to the
4 appropriate retirement trust fund. Any supplemental payments to retirees may not be funded from
5 plan assets.

6 **6. Savings. (Section 1514-A).**

7 In the event a court determines that Section 1506-A is illegal, then to the maximum extent
8 permitted by law, an equivalent amount of savings shall be obtained through pay reductions,
9 which shall not exceed 4% per year, capped at a maximum of 16% of pay. The Measure includes
10 additional provisions for severance of any provisions that are somehow found unenforceable.

11 **7. Future Changes (Sections 1503-A, 1504-A, 1505-A).**

12 The Act supersedes all other conflicting or inconsistent “wage, pension or post-
13 employment benefit provisions in the Charter, ordinances, resolutions or other enactments.” The
14 Act reserves to the Voters the right to consider any change “related to pension and other post-
15 employment benefits.” Subject to the limits contained in the Act, the City Council has the
16 authority to take all actions necessary to effectuate the Act, with a goal that implementing
17 ordinances become effective by September 30, 2012. Many of the features of Measure B call for
18 ordinances to implement Measure B’s provisions.

19 **C. Federal Action**

20 The City has filed an action in Federal District Court to seek a declaratory judgment as to
21 the legality of most provisions of Measure B. The City has been clear that its goal is to adjudicate
22 the legality of Measure B before any out of pocket economic impact on employees. The federal
23 action names not just the SJPOA, but other City unions, the action seeks adjudication under both
24 federal and state law, and the action addresses more provisions of Measure B than are addressed in
25 this action. The City brought the federal action in an effort to provide an efficient forum for the
26 adjudication of all parties interests and to avoid a multiplicity of actions.
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III. ARGUMENT

A. The Court Must Deny The TRO Because The SJPOA Cannot Show Irreparable Harm.

Where a party seeks a temporary restraining order, it must demonstrate the threat of “great and irreparable injury” that justifies granting injunctive relief before a matter can be heard on a properly noticed motion for preliminary injunction. (Cal. Code Civ. Proc. (“C.C.P.”) § 527(c).) Under this analysis, injunctive relief is appropriate only when a plaintiff demonstrates *both* that it is likely to prevail at trial *and* that failure to provide interim relief would cause irreparable harm. (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813.)

SJPOA members cannot demonstrate that they would suffer any irreparable harm in the absence of the injunction, much less the “great and significant” irreparable harm needed to justify a TRO. (C.C.P. § 527(c).)

1. **The Elections Code Does Not Permit The City To Immediately Implement Measure B.**

Under the state Elections Code, Measure B will not be certified for approximately a month and a half. The election official has 28 days from the election to complete the final official canvass of votes and certify the election results. (Cal. Elections Code §15372.) The results are then submitted to the governing board which must adopt a resolution declaring the results of the election. (Id., §§ 9269, 15400.) Finally, Charter amendments must be submitted to the Secretary of State and become effective only when they are accepted and filed by the Secretary. (Gov. Code §34459, 34460.) Generally, this activity takes around a month and a half. Based on this schedule, the City has no legal ability to immediately implement Measure B.

2. **Measure B Is Not Self-Executing But Requires Implementing Ordinances.**

Not only must the City wait until Measure B is accepted and filed with the Secretary of State, the City must enact implementing ordinances for much of Measure B. (Declaration of Alex Gurza.) The SJPOA has identified four provisions of Measure B in its request for a TRO. In each case, the City has no plans to implement those Charter provisions in the near future, and

1 must draft implementing ordinances and procedures. Measure B does not set a firm deadline for
2 the implementation of its provisions. Rather, Measure B sets only a goal of implementation by
3 September 30, 2012.

4 In addition, some of the provisions of Measure B identified by the SJPOA are not new to
5 SJPOA members, but already are contained in City ordinances and City-union Memoranda of
6 Agreement. For those provisions, there will be no change to SJPOA members.

7 Section 1509-A. Disability Retirements. This Charter section revises the definition for
8 when an employee is entitled to receive a disability retirement. Implementation of this section will
9 require the City to draft, review and enact implementing ordinances. Under the City's Municipal
10 Code, these ordinances must be submitted to the City Council for a first reading, sent to the
11 Retirement Board for a review and comment period, and then returned to the City Council for a
12 second reading. The ordinances do not become law until 30 days after the second reading. These
13 ordinances are not yet drafted. Therefore, it will be several months before the new definitions
14 may be implemented. (Gurza Dec., ¶ 7.)

15
16 The Charter section on disability retirements also requires the creation of an independent
17 panel of medical experts, appointed by the City Council. The creation of this panel also requires
18 the drafting and enactment of implementing legislation. In addition, the City Council must
19 engage in the process of choosing the members of the panel and establishing its procedures.
20 Again, these ordinances are not yet drafted. (Gurza Dec., ¶ 8.)

21
22 Section 1511-A. Supplemental Payments to Retirees. Measure B provides that the
23 Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued and its assets returned to
24 the appropriate retirement trust fund. This action will require implementing actions by the City
25 Council and the Retirement Boards. However, there is no immediate change for retirees because
26 the City has not made any payments under the SRBR for at least two years. On May 8, 2012, the
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1 City Council passed the most recent ordinance “to continue to suspend the supplemental retiree
2 benefit reserve distribution from the Police and Fire Department Retirement Plan for fiscal year
3 2011-2012, and provide that there shall be no supplemental retiree benefit reserve distribution
4 from the Police and Fire Department Retirement Plan during Fiscal Year 2012-2013.” City
5 unions have recognized that the SRBR is a matter for negotiation, and a number of them have
6 proposed its elimination. (Gurza Dec., ¶ 9.)

7
8 Section 1512-A. Retiree Healthcare. Measure B requires employees to contribute a
9 minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded
10 liabilities. The City’s Municipal Code, Sections 3.28.380(C)(1)[Federated employees] and
11 3.36.575(c)(1 and (2) [Police and Fire] already contains the requirement of a 50% split between
12 the City and employees. Moreover, City unions, including the SJPOA, have agreed in MOAs to
13 transition to prefunding of the full Annual Required Contribution (“ARC”) for the retiree
14 healthcare benefits, which requires increased contributions by the City and employees. Under
15 SJPOA MOA, Article 50, the transition to full funding will occur over a five year period that
16 began on June 28, 2009. (Gurza Dec., ¶ 10.)

17
18 Measure B also places the definition of “low cost plan” – the benchmark for City
19 contributions for retiree health benefits – into the Charter. This is the same definition currently
20 in the City’s Municipal Code. Therefore, this is not a change for employees or retirees. (Id.)

21 **B. SPOA Has Not Shown Its Members Would Suffer Irreparable Injury Absent The**
22 **TRO Because It Has An Adequate Remedy At Law**

23 Where the moving party seeks to restrain public officers or agencies, public policy
24 considerations require that the movant “make a *significant* showing of irreparable injury.” (*Tahoe*
25 *Keys Property Owners’ Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459,
26 1471 (emphasis added).) Injunctive relief is appropriate only when damages alone are not
27 adequate or there are no other adequate remedies at law. (C.C.P. § 526.)

1 Here, SJPOA presumably seeks only a monetary remedy: disability retirement payments,
2 supplemental retirement payments, and lower payments for retiree health cares. Any such
3 monetary damages are insufficient to support the "significant showing of irreparable injury"
4 necessary for injunctive relief. If SJPOA were to prevail on its challenge of the the Measure B
5 provisions it challenges, it has an adequate remedy at law in the form of damages and interest.

6 **C. The SJPOA Is Not Entitled To Injunctive Relief Because It Is Not Likely To**
7 **Prevail On The Merits Of Its Claims**

8 Even if the SJPOA could show irreparable harm the court should deny the TRO because
9 the SPOA is not likely to prevail on the merits of its claims.

10 SJPOA claims that provisions of Measure B violate its vested rights under the state
11 constitution. Before a Court will enforce a claimed contractual right there must be "clear" and
12 "unmistakable" evidence that the public entity intended itself to be bound to provide the benefit.
13 The California Supreme Court recently held that: "legislation in California may be said to create
14 contractual rights when the statutory language or circumstances accompanying its passage' clearly,
15 .. evince a legislative intent to create private rights of a contractual nature enforceable against the
16 [governmental body].'" *Retired Employees Assn of Orange County, Inc, v, County of Orange*, 52
17 Cal. 4th 1171, 1187 (2011) ("REAOC declined to decide whether those circumstances existed for
18 the Orange County retirees.)

19 The Supreme Court cautioned: "A court charged with deciding whether private contractual
20 rights should be implied from legislation, however, should 'proceed cautiously both in identifying
21 a contract within the language of a ... statute and in defining the contours of any contractual
22 obligation.'" *Id.*, quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470
23 U.S. 451, 466, 105 S.Ct. 1441 (1985). It noted that "[t]he requirement of a 'clear showing' that
24 legislation was intended to create the asserted contractual obligation (citation) should ensure that
25 neither the governing body nor the public will be blindsided by unexpected obligations." *Id.* at
26 1188- 1189, citing *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir. 1997).

27 In this case, the SJPOA cannot make a clear showing that the City obligated itself to
28 maintain the status quo for any of the benefits addressed in its TRO motion. San Jose is a Charter

1 City with "plenary authority" over compensation, including retirement benefits, of its employees.
2 (*Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 317
3 (1979). The City Charter expressly reserves the City's right to modify its retirement benefits:
4 "Subject to other provisions of this article, the Council may at any time, or from time to time,
5 amend or otherwise change any retirement plan or plans for all or any officers or employees."
6 (Charter section 1500.) The City's retention of authority is further demonstrated by the changes
7 made by the City Council to these benefits in the Municipal Code and City resolutions, and the
8 fact that the City and unions bargained over these issues. Accordingly, the voters were entitled to
9 make changes in the definition of disability for disability retirement benefits, the payment of
10 supplemental retirement benefits, the employee contributions to retiree health and other changes.

11 IV. CONCLUSION

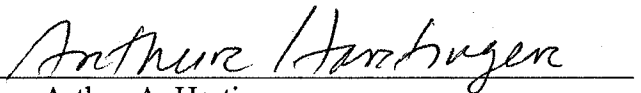
12 The SJPOA cannot demonstrate entitlement to a TRO. It cannot show irreparable harm,
13 because implementation of Measure B is not imminent and its members would be seeking only
14 monetary relief. In addition, the Court should not set a schedule for any preliminary injunction
15 until the City has made its motion for the Court to stay this action while the federal action
16 proceeds. The federal action is more inclusive in terms of claims and parties and thus a more
17 efficient forum for adjudication of Measure B.

18 SJPOA's application should be denied in its entirety.

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20 DATED: June 5, 2012

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21
22 By:



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by JMR

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